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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 JORGE ARTURO ZERMENO DELGADO,

10 Petitioner,

11 v.

12 JEFFERSON B. SESSIONS, et al.,

13 Respondents.

Case No. C17-1031-RSL-JPD

REPORT AND RECOMMENDATION

14 Petitioner, who is proceeding through counsel, brings this 28 U.S.C. § 2241 immigration  
15 habeas action to obtain release from immigration detention at the Northwest Detention Center in  
16 Tacoma, Washington. Dkt. 1. The Government has moved to dismiss. Dkt. 4. Petitioner did  
17 not file a response. Having considered the parties' submissions, the balance of the record, and  
18 the governing law, the Court recommends that the Government's motion to dismiss be  
19 GRANTED, petitioner's habeas petition be DENIED, and this action be DISMISSED without  
20 prejudice.

21 I. BACKGROUND

22 Petitioner, a native and citizen of Mexico, entered the United States in May 1995 without  
23 inspection. Dkt. 1 at ¶¶ 6, 16; Dkt. 5-1 at 2-3. On May 17, 2017, U.S. Immigration and Customs

1 Enforcement (“ICE”) officers arrested petitioner and transferred him to the Northwest Detention  
2 Center. Dkt. 1 at ¶ 23; Dkt. 5-1 at 46, 48. ICE served him with a Notice to Appear, charging  
3 him with removability as a non-citizen present in the country without being admitted or paroled,  
4 and made the initial decision to hold him without bond. Dkt. 5-1 at 2-3, 48. Petitioner requested  
5 that an immigration judge (“IJ”) review the custody determination. *Id.* at 48. On June 12, 2017,  
6 an IJ held a custody hearing and denied bond, finding that petitioner presented a danger to the  
7 community and was a flight risk. *Id.* at 54. Petitioner appealed this decision to the Board of  
8 Immigration Appeals (“BIA”), and his appeal remains pending. *See id.* at 56-58; Dkt. 1 at ¶¶ 13,  
9 27. Petitioner’s immigration proceedings also remain pending. *See* Dkt. 5-1 at 50, 52.

10 On July 6, 2017, petitioner initiated this action to obtain release on bond or supervision.  
11 Dkt. 1 at 13. He contends that the IJ violated his due process rights and abused her discretion in  
12 failing to follow the correct legal standard when considering the evidence presented at the  
13 custody hearing. *Id.* at ¶¶ 28-31. The Government now moves to dismiss. Dkt. 4. Petitioner did  
14 not file a response.

## 15 II. DISCUSSION

16 The Government argues (1) petitioner’s detention is lawful, (2) petitioner has been  
17 afforded all the due process to which he is entitled, (3) the Court lacks subject matter jurisdiction  
18 to evaluate the IJ’s discretionary bond determination, and (4) petitioner failed to exhaust his  
19 administrative remedies. Dkt. 4. As discussed below, the Court concludes that dismissal is  
20 appropriate because petitioner has not exhausted his administrative remedies. Thus, the Court  
21 does not address the Government’s remaining arguments.

22 Title 8 U.S.C. § 1226 provides the framework for the arrest, detention, and release of  
23 non-citizens, such as petitioner, who are in removal proceedings. 8 U.S.C. § 1226; *see also*

1 *Demore v. Kim*, 538 U.S. 510, 530 (2003) (“Detention during removal proceedings is a  
2 constitutionally permissible part of that process.”). Section 1226(a) grants the Department of  
3 Homeland Security (“DHS”) discretionary authority to determine whether a non-citizen should  
4 be detained, released on bond, or released on conditional parole pending the completion of  
5 removal proceedings, unless the non-citizen falls within one of the categories of criminals  
6 described in § 1226(c), for whom detention is mandatory.<sup>1</sup> 8 U.S.C. § 1226.

7 When a non-citizen is arrested and taken into immigration custody pursuant to § 1226(a),  
8 ICE makes an initial custody determination, including the setting of bond. *See* 8 C.F.R. §  
9 236.1(c)(8). After the initial custody determination, the detainee may request a bond  
10 redetermination by an IJ. 8 C.F.R. § 236(d)(1). At the bond redetermination hearing, the burden  
11 is on the detainee to show to the satisfaction of the IJ that he warrants release on bond. *See In re*  
12 *Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006). In making a bond decision under § 1226(a), an IJ  
13 must consider whether the detainee “is a threat to national security, a danger to the community at  
14 large, likely to abscond, or otherwise a poor bail risk.” *Id.* (citing *In re Patel*, 15 I. & N. Dec.  
15 666 (B.I.A. 1976)). An IJ also may consider any number of discretionary factors, including: (1)  
16 whether the detainee has a fixed address in the United States; (2) the detainee’s length of  
17 residence in the United States; (3) the detainee’s family ties in the United States, and whether  
18 they may entitle the detainee to reside permanently in the United States in the future; (4) the  
19 detainee’s employment history; (5) the detainee’s record of appearance in court; (6) the  
20 detainee’s criminal record, including the extensiveness of criminal activity, the recency of such  
21 activity, and the seriousness of the offenses; (7) the detainee’s history of immigration violations;

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23 <sup>1</sup> Although the relevant statutory sections refer to the Attorney General, the Homeland Security Act of 2002, Pub. L.  
No. 107-296 § 471, 116 Stat. 2135 (2002), transferred most immigration law enforcement functions from the  
Department of Justice (“DOJ”) to DHS, while the DOJ’s Executive Office for Immigration Review retained its role  
in administering immigration courts and the BIA. *See Hernandez v. Ashcroft*, 345 F.3d 824, 828 n.2 (9th Cir. 2003).

1 (8) any attempts by the detainee to flee persecution or otherwise escape authorities; and (9) the  
2 detainee's manner of entry to the United States. *Id.*

3 If the IJ denies bond, the detainee may appeal to the BIA. 8 C.F.R. § 236.1(d)(3). If the  
4 BIA affirms the IJ's decision, the detainee may seek habeas relief from the district court.  
5 *Leonardo v. Crawford*, 646 F.3d 1157, 1159-61 (9th Cir. 2011) (proper procedure to challenge  
6 IJ's bond determination is to appeal to the BIA, wait for the BIA to render its decision, and then  
7 file a habeas petition in the district court); *see also Sun v. Ashcroft*, 370 F.3d 932, 941 (9th Cir.  
8 2004).

9 Here, petitioner challenges the IJ's denial of bond. Because the BIA has not yet ruled on  
10 his appeal of the IJ's bond determination, petitioner has not exhausted his administrative  
11 remedies. *See Leonardo*, 646 F.3d at 1159-61. The exhaustion requirement, however, is  
12 prudential, rather than jurisdictional. *Singh v. Holder*, 638 F.3d 1196, 1203 n.3 (9th Cir. 2011).  
13 Therefore, it may be waived. *See Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007).

14 When deciding whether to require prudential exhaustion, courts consider whether "(1)  
15 agency expertise makes agency consideration necessary to generate a proper record and reach a  
16 proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the  
17 administrative scheme; and (3) administrative review is likely to allow the agency to correct its  
18 own mistakes and to preclude the need for judicial review." *Id.* (quoting *Noriega-Lopez v.*  
19 *Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003)). Even if these factors weigh in favor of prudential  
20 exhaustion, waiver of exhaustion may be appropriate "where administrative remedies are  
21 inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture,  
22 irreparable injury will result, or the administrative proceedings would be void." *Laing v.*

1 *Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (quoting *S.E.C. v. G.C. George Sec., Inc.*, 637 F.2d  
2 685, 688 (9th Cir. 1981)).

3       The Court declines to waive the exhaustion requirement. All three of the *Puga* factors  
4 weigh in favor of prudential exhaustion. First, petitioner’s BIA appeal asserts that the IJ abused  
5 her discretion in assessing whether he poses flight risk or danger to the community, Dkt. 1 at ¶  
6 27, and this is a question well suited for agency expertise. Indeed, to the extent petitioner  
7 challenges the IJ’s discretionary judgment, this Court does not have jurisdiction to consider his  
8 claim. *See* 8 U.S.C. § 1226(e); *Prieto-Romero v. Clark*, 534 F.3d 1053, 1058 (9th Cir. 2008)  
9 (“[non-citizen] may appeal the IJ’s bond decision to the BIA, *see* 8 C.F.R. § 236.1(d), but  
10 discretionary decisions granting or denying bond are not subject to judicial review, *see* §  
11 1226(e)”). Second, relaxation of the exhaustion requirement would encourage deliberate bypass  
12 of the administrative remedies. And third, administrative review would allow the agency to  
13 correct any mistake in the IJ’s determination. In addition, the Court is not persuaded that  
14 petitioner’s claim of irreparable injury due to continued detention, Dkt. 1 at ¶ 15, warrants waiver  
15 of the exhaustion requirement. Because all immigration habeas petitioners could raise the same  
16 argument, if it were decisive, the prudential exhaustion requirement would always be waived—  
17 but it is not.

18       When a petitioner fails to exhaust prudentially required administrative remedies and  
19 exhaustion is not waived, “a district court should either dismiss the petition without prejudice or  
20 stay the proceedings until the petitioner has exhausted remedies . . . .” *Leonardo*, 646 F.3d at  
21 1160. In this case, petitioner’s challenge to the IJ’s bond determination should be dismissed  
22 without prejudice.  
23

1 III. CONCLUSION

2 The Court recommends that the Government's motion to dismiss, Dkt. 4, be GRANTED,  
3 petitioner's habeas petition be DENIED, and this action be DISMISSED without prejudice. A  
4 proposed order accompanies this Report and Recommendation.

5 Objections to this Report and Recommendation, if any, should be filed with the Clerk and  
6 served upon all parties to this suit by no later than **October 6, 2017**. Failure to file objections  
7 within the specified time may affect your right to appeal. Objections should be noted for  
8 consideration on the District Judge's motion calendar for the third Friday after they are filed.  
9 Responses to objections may be filed within **fourteen (14)** days after service of objections. If no  
10 timely objections are filed, the matter will be ready for consideration by the District Judge on  
11 **October 13, 2017**.

12 This Report and Recommendation is not an appealable order. Thus, a notice of appeal  
13 seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the  
14 assigned District Judge acts on this Report and Recommendation.

15 Dated this 15th day of September, 2017.

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17 JAMES P. DONOHUE  
18 Chief United States Magistrate Judge  
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